



## **DISTINCTIVE RELIGIOUS CHARACTER** by Merilin Kiviorg

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### *Introduction*

Schools may have a distinctive character due to a (teaching) philosophy, world view or specific ethos they represent. They may also have the character by focusing on specific subjects such as mathematics or music. The following focuses on schools with specific religious character – faith schools. The specific religious character of schools involves a specific set of questions which is not necessarily applicable to other schools with distinct character. Hence, it is important to pay attention to this special category of schools. The contributions to these volumes have provided useful material in order to present a comparative account on law and policy regarding faith schools in different European states. Issues such as establishment, public funding and the autonomy of those schools in respect to, for example, curriculum, admission policies or selection of teaching staff will be discussed. Major debates regarding faith schools will also be reflected on. Special attention will be paid to what kind of values faith schools are allowed to teach.

There is a great deal of commonality among the states represented in this volume. To some degree this commonality comes from international and European instruments these countries have signed up to, including the Protocol 1 Article 2 of the European Convention on Human Rights (hereinafter the ECHR), protecting the right to education and right of parents to educate their children in conformity with their own philosophical convictions. However, the law and policy regarding schools with religious character in Europe has also been influenced by specific history, religious composition of the population, and the state-church relationship in those states. Social factors such as secularization and immigration play a significant role as well. In this regard one has to admit that there are limits to any comparative work taking into account the specific contexts of different countries. However, the attempt will be made to compare and draw some parallels in order to find commonalities among European states, but also probe rationales for different solutions.

What adds to the complexity of this task is the fact, that not only are there different European approaches to schools with religious character, but also considerable variety amongst these schools themselves, including within one state. This diversity raises a number of questions of principle which, one way or the other, have been discussed in most countries. For example, should the state place any constraints on the arrangements that parents make for their children's education? Should the state support schools with a distinctive religious ethos or should this be left entirely for private provision? Where the state supports faith schools, should they be open to all students and teachers, irrespective of religious background, and to what extent should the state control the curriculum and values taught at these schools? These questions relate to broader issues of protecting the individual, collective (group) or national (religious) identity, and to the State's role in citizenship building and integration. Although international and European instruments create a framework for the educational environment where schools with specific religious character operate in Europe, they also respect national traditions and cultural heritage. The European Court of Human Rights (hereinafter ECtHR) has applied a broad deference to national decisions<sup>1</sup> in cases touching freedom of religion or belief. However, there are tensions between an approach sensitive to traditions and heritage and an approach focused on protection of individual rights; one of the examples where tensions have occurred is with respect to religious education.

Claims for protection of collective rights also contribute to the complexity of the topic. For example, international human rights instruments such as the ECHR protect both the individual and collective dimension of freedom of religion or belief. The collective expression of one's religion or belief is often most important for an individual believer.<sup>2</sup> The ECtHR has stressed that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the ECHR affords.<sup>3</sup> It needs to be noted that although there is common ground on collective religious autonomy in Europe, there are also nuances which are influenced by tradition, history, and societal attitudes in different

countries, which affect the scope of autonomy attributed to communities.<sup>4</sup> The extent to which this autonomy extends from religious communities to schools with a specific ethos and to what extent they are allowed to discriminate on religious or other grounds, is a matter of contention. This bundle of aforementioned questions seems to dominate the current European debate.

### *The place of faith schools in the school system*

As mentioned above, there is variety among the schools with specific religious character. In Europe, schools with religious character are represented in a broad spectrum of public and private schools (which can be both publicly funded and non-publicly funded). It also needs to be noted that sometimes the distinction of public-private can be complicated. Due to historical factors and the role of religion in society, in a few European countries faith schools have a significant role in providing education. Public funding and recognition may also blur the lines of public-private status of these schools. For example, in Ireland primary and to some extent secondary school education are provided by state funded private schools overwhelmingly owned and managed by religious denominations.<sup>5</sup> In the United Kingdom, faith schools are a common feature of the state school system. Over 30 percent of maintained schools in England have a religious character. These schools are, to a large extent, funded by the state although they have additional funding from the Church. They are effectively public sector organisations.<sup>6</sup> Other maintained schools, which are not classified as having religious character, cannot be called entirely secular either as religious education and collective worship are integral elements in the educational provision and ethos of all maintained schools in England.<sup>7</sup> The latter can be identified in Scandinavian countries with state church systems as well. In Germany, to accommodate regional characteristics in some *Länder*, partly public schools are run as Christian community schools (Bavaria, Baden-Württemberg, Rhineland-Palatinate) while in other states, schools can be instituted as schools of religious denominations.<sup>8</sup> Among the variety of schools there are public schools with a Catholic character and public schools with a Protestant character. Public confessional schools serve about one-third of the elementary pupils in North Rhine-Westphalia, the largest state.<sup>9</sup> In the Netherlands about two thirds of primary schools and secondary schools are publicly funded denominational (mainly Catholic and Protestant, but also Muslim and other) schools.<sup>10</sup> In Belgium almost 60 percent (in Flanders 75 percent) of secondary school pupils attend classes in Catholic schools. Public education is statistically less important than education provided by Catholic schools.<sup>11</sup> Thus, in some countries state religious schools or religious schools with public status continue to play a significant role as a legacy of the substantial historical involvement in providing education. Historically, religious communities were at the forefront of providing education long before the state assumed this role.

Besides public or semi-public confessional schools, there are also private confessional schools with or without or with some public funding. In some countries faith schools are only established as private schools (e.g. Estonia, Romania). The freedom to establish and direct private educational establishments is recognized in international law.<sup>12</sup> Many states have constitutional guarantees for the right to establish private schools. For example, the Irish constitution expressly prohibits a state monopoly in education. It emphasizes the right of parents to provide for the religious, moral, intellectual, physical and social education of their children, and protects the right to establish private schools.<sup>13</sup> In Netherlands, the freedom of education entails freedom to found a school, to administer a school, and to determine its confessional identity.<sup>14</sup>

However, the right to establish private schools is not absolute. Commonly, among other schools, even privately funded schools are subject to minimum requirements in the form of state registration/licensing, inspection and covering certain topics in their curriculum. International and European law, as well as domestic standard setting in individual states, have provided a framework to guarantee children's educational development and basic grounding in citizenship.

What adds to the variety of the nature of schools is the fact that some traditionally religious schools are not strongly religious today. For example, in the United Kingdom not all faith schools promote a strong religious ethos. "The recognition of a religious character of a given school tells us little about the legal framework applicable to that school or the strength of its religious ethos."<sup>15</sup> In Germany the confessional identity of some of the faith schools has been fading. The identity of Catholic and even more of the remaining Protestant public schools may be limited to their periods of religious instruction. Clerical influence is strictly limited. "Despite the continuing existence of denominational public schools, then, they have tended to differ little, if at all, from other public schools."<sup>16</sup> In many Catholic and Protestant schools in the Netherlands, Christian character has come to play a minor role and parent choice is more based on the general image of the school and its distance from the pupil's home than on religious identity. "This is a matter of great concern to denominational leaders and over the past thirty years there have been many efforts, some fairly successful, to explore the distinctive identity or 'signature' of religious schools."<sup>17</sup> The French report notes that although Catholic schools serve two million pupils, the real distinctiveness of these Catholic schools is sometimes called into question, since those that receive public funding are required to conform themselves in many respects to the ever-changing model of public schools. It is also pointed out that in a highly- secularized society, the religious distinctiveness of these Catholic schools is sometimes difficult to detect.<sup>18</sup>

The above does not mean that the importance and the role of schools with religious character are necessarily in decline in Europe. For example, an interesting phenomenon can be identified in a number of European countries: parents of no specific religious background or parents belonging to minority religions sometimes

prefer schools with a traditionally religious character. One of the reasons seems to be a belief that they provide a better learning environment and education. McClean points out that church schools of all types in the United Kingdom are very popular with parents and there are often more applications for admissions than there are places available.<sup>19</sup> Torfs points out that the reason for Catholic education being more important than public education in Belgium is a mix of tradition and standards in terms of quality.<sup>20</sup> Although exact statistical data is not available, non-religious parents in Estonia sometimes enroll their children in denominational schools for educational purposes and with the hope that these schools are better at discipline and provide an atmosphere of mutual respect.

Parents belonging to minority religions, such as, for example, Muslims, have in some countries chosen denominational Christian schools. For example in Netherlands, in the absence of Islamic schools in their particular neighbourhood, Muslim parents often choose a school of a Christian denomination for their child.<sup>21</sup> Zoontjens and Glenn point out that statistics show that most of the members of Netherlands's Muslim, but also Hindu communities choose public schools or Protestant or Catholic non-government schools and not Hindu or Muslim schools.<sup>22</sup> In Belgium some devoted Muslims have felt more comfortable in Catholic schools than in public schools.<sup>23</sup>

Today we deal with a multitude of different religious groups – so called old religions and new religious movements. Due to several factors, including economic globalization and migration, there are a growing number of Muslim communities and other groups who make historically and culturally Christian, but largely secularised, Europe feel uneasy. In addition, the increase of so-called new religious movements has caused resentment throughout Europe and especially in the post-Soviet region, and especially in the 1990s. Post 9/11 security concerns and issues on integration have also contributed to some resentment towards minority groups. All this presents a serious test for democratic orders facing the facts of cultural and religious diversity. Additionally, many people place great value in historically dominant religions, even if they are not themselves devoted church-goers or even if they do not believe at all. This stance is a complex combination of national identity, valued traditions, and perhaps the belief of a majority. In a pluralistic society, both for majorities as well as for minorities, religion plays a peculiar role in identity related dynamics. Although most European legal systems provide protection for religious freedom and to religious minorities, the scope of this protection is affected by many factors. History, traditions (including constitutional traditions), and social factors play crucial roles in shaping relations between religious individuals, communities and the State. One should also note that political agendas may have some role in these relations.

Against this background one needs to note concerns and difficulties in some countries in relation to establishing minority faith schools. For example, in 2005, an attempt to establish an Islamic school in Milan failed, as the school was closed for security



reasons and no similar attempts followed.<sup>24</sup> In Netherlands, for some time there was opposition to approval of Muslim or Hindu schools, on the grounds that these might serve to further isolate immigrant minority children. Initially concerns about a threat for Western values, the rule of law, state security, but also segregation were expressed. Many of these concerns proved later to be unfounded.<sup>25</sup> There is a great danger that ignorance, cultural prejudice and suspicion will be allowed to guide decisions over the scope of freedom of religion or belief, leading to overreaction by states in cases where a more balanced approach is needed, including in the area of education.

## *Funding of faith schools*

Funding of faith schools is probably one of the most controversial issues in many European states. Should the state support schools with a distinctive religious ethos or should this be left entirely for private provision? One also can identify different rationales behind the funding or no funding. In some cases the extent of autonomy of faith schools may depend on state funding or the extent of such funding. The following provides some brief general observations. Specific issues, such as admission of pupils, selection of staff, which also relate to funding, will be discussed in next sections.

Some countries provide funding only to faith schools with public status or recognition. In other countries private schools receive full funding or contributions from the state also. Sometimes equal treatment questions have been raised as to the unequal financing of different categories of schools. Equal treatment questions have also been raised in relation to providing support to schools with a religious character, but not to other schools with specific ethos. For example, in Austria only the schools operated by the legally recognized religious communities (which means, above all, Catholic, but also some Protestant and Jewish schools) are entitled to public funding covering all of their personnel costs.<sup>26</sup> It is up to the discretion of the state whether to award subsidies to non-confessional independent schools which offer a distinctive pedagogy. No legal entitlement for the allocation of subsidies exists. In practice public support has covered only a small part of their costs. This unequal treatment has been appealed against, albeit unsuccessfully, to the European Commission on Human Rights.<sup>27</sup> In the Netherlands virtually all non-government schools are publicly funded, provided they meet certain quality requirements.<sup>28</sup>

Using public sources for funding of faith schools is controversial, especially if funding is not distributed equally to religious minorities or if state schools give priority to pupils according to their religious affiliation. Some see these subsidies to schools as involving a form of hidden public support to religious groups or promoting certain religion or world view, thereby offending the neutrality principle. However, as Ahdar and Leigh point out, it is seldom recognised that the reverse is also true: “the

provision of public education is still...heavily dependent on church schools in many countries. Attacks on the religious ‘inequality’ of these arrangements frequently ignore both history and practicality.”<sup>29</sup>

As to private or non-governmental schools, the rationale behind financing has been explained in constitutional terms. For example, according to German constitutional law, taking into account that the freedom to establish private schools is set forth in the constitution, the state is obliged to fund these schools if otherwise the existence of the private school system is endangered.<sup>30</sup> The Swiss report points out a similar reasoning in the Federal Education Council: the state should support the establishment and use of private educational institutions on the grounds that an extension of state subsidy increases educational opportunity and furthers educational change. “The rights of choice set out in the various Declarations of Human Rights can only be made effective if direct or indirect state subsidies to independent schools help parents to use them freely, regardless of their ability to pay full or part fees.”<sup>31</sup> Thus, according to these examples, one of the rationales of providing subsidises to faith schools is that it guarantees constitutional right to education (involving right to establish private schools), educational opportunities, and freedom of choice. One could perhaps add to this list the protection of freedom of religion or belief and parents’ right to educate their children in conformity with their own philosophical convictions.

In some countries where the financing of schools with religious character has been questioned in the light of it being in breach of the state neutrality requirement, the approach seems to be similar to the above. In France, although it has been argued that private schools under contract (i.e. receiving public funding) are obligated to observe the same religious and philosophical neutrality as public schools, this view has not prevailed. The Constitutional Court in France has ruled that safeguarding the distinctive character of a school under contract is simply to put into practice educational freedom. “It was with the intention of protecting this right against restriction in the name of *laïcité* that the legislators inserted into the *loi Debré* the provision that schools under contract would provide the State- required instruction in a way that respected their distinctive character.”<sup>32</sup>

## *Decisions about admitting pupils*

It needs to be pointed out that national laws in Europe generally permit faith schools to operate their own criteria for the admission of pupils, which may or may not include religious criteria. However, there are differences in approach depending on what type of faith school is at issue: public or private/non- governmental, publicly funded private or non-publicly funded private school. The extent of freedom in admission policies is the largest regarding non-publicly funded private schools. In some cases the extent of autonomy in admission policy is not dependent on public

funding or status of the schools in public school system. For example, in the Netherlands, Germany and Estonia there are clear examples of limitations to the right of parents to obtain independent education for their children in accordance with their own philosophical and educational convictions. There is no automatic right of admission to a non-government school whether it is publicly funded or not. In Germany there is no right for pupils who do not belong to the denomination of the school to attend a public confessional school, unless there is no alternative within a reasonable distance. In Austria, private schools which are publicly funded and maintained by a legally recognized church or religious community, may select pupils for admission according to religion, creed or native tongue.<sup>33</sup> Although private schools with a special mission in Estonia receive public funding, it has not been seen as a possible reason to abandon prioritising in admission. Private schools are allowed to discriminate on religious grounds.<sup>34</sup> Thus, these schools are to a certain extent free to select pupils.

However, while enjoying autonomy in their admission policies, faith schools, whatever their status, are not absolutely free in adopting or implementing these policies. For example, in Germany the schools may not exercise selection in such a way that only children from wealthy families are admitted; prohibition of discrimination in admission policy on other grounds such as racial discrimination has been addressed by courts in the Netherlands<sup>35</sup> and the United Kingdom.<sup>36</sup> In the United Kingdom designated faith schools are permitted to discriminate on grounds of religion, but not on grounds of race or ethnicity.<sup>37</sup> For example, Catholic schools can give priority to Catholics, Muslim schools to Muslims. The law allows such schools to determine eligibility by reference to religious membership or practice, but not to ethnicity or race. In Belgium, Deridder points out, discrimination on grounds of race cannot possibly find any justification within the pedagogic project, “since the freedom of the organizing body to define its content does not stretch that far”.<sup>38</sup> However, as seen in the controversial Jewish Free School case in the United Kingdom, determining what is racial discrimination and what is religious discrimination can sometimes be difficult.<sup>39</sup>

States such as France, Slovenia and Spain represent countries where public funding restricts schools’ freedom in their admission policies. In France religious schools which operate under a contract with the government must admit pupils without any distinction of either race or religion. A private school which is not under contract and thus is not providing a public service is free to discriminate in admission, unless the discrimination is on the basis of race, which would be subject to criminal penalties.<sup>40</sup> In Portugal, schools that have some funding from the State, according to simple contracts, have the right to decide whether or not to admit applicants, without any non-discrimination requirement. However, fully publicly funded private schools (with association contracts) do not have that right. In Romania, on the other hand, all schools (public or private) are prohibited to discriminate among pupils, on any basis, in order to maintain the distinctive character of the school.



There seem to be two opposing views which have influenced the extent of autonomy of publicly funded faith schools. Roughly speaking, the first one sees these schools as providing what is essentially a public service, and thus requiring public funding. As seen above, in many cases this has also meant that they have less freedom in admission policies. According to the second view, there should be more flexibility in the admission policies of faith schools. They are guaranteeing freedom of religion or belief and pluralism indissociable from a democratic society,<sup>41</sup> but also diversity in education. However, in some countries where the publicly funded faith schools are allowed to discriminate on religious grounds (United Kingdom, Netherlands and Germany) the arguments have been advanced for faith schools to be more inclusive. One needs to note that these calls for openness are primarily made in countries where faith schools continue to play a significant role in providing education.

One needs to also emphasize that in some countries (e.g. United Kingdom, Latvia and Netherlands) the right to discriminate on religious grounds is specifically granted to schools with religious ethos but not necessarily to others. The latter has invoked questions as to how to define a religious school. As Glenn points out, in the case of the Waldorf schools, there is some disagreement in Germany, as to whether they should be considered religious (because of Rudolf Steiner's quasi-religious theory of "anthroposophism") or simply pedagogically distinctive.<sup>42</sup> Similar disagreements seems to exist in Austria: whether or not to recognize that a distinctive pedagogy may, under the conditions of contemporary cultural pluralism, in fact express an understanding about the world and the goals of education that is functionally "religious."<sup>43</sup> The issue of determining what is a religious school may potentially arise everywhere, also regarding minor or relatively new religious movements.

## *Decisions about staff*

In countries which belong to the European Union (EU) employment laws have been influenced by the EU anti-discrimination legislation. The EU Employment Directive prohibits direct and indirect discrimination on grounds of religion or belief.<sup>44</sup> However, it allows certain exemptions for religious organizations and their affiliated institutions such as schools. The anti-discrimination legislation at the European Union level leaves room for individual states to allow schools with specific religious ethos to set up additional requirements for staff selection. However, there are limits to these exemptions. The exemption is allowed when the characteristic (religion) constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.<sup>45</sup> The directive further states that: "This difference of treatment ... should not justify discrimination on another ground."<sup>46</sup> However, provided that its rules are otherwise complied with, the directive does not prejudice the right of churches and other public or private organisations, "the ethos of which is based on religion or belief, acting in conformity

with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."<sup>47</sup> There is room for the interpretation of what these requirements actually mean.

Additionally, most of the countries represented in this volume are signatories to the ECHR, and thus, are to a degree influenced by the Convention and its case law. In employment situations and regarding autonomy of religious communities or their affiliated institutions (broadly defined) such as schools, the ECtHR decisions have usually been based on what can be called the principle of voluntarism. This means that by accepting a membership or appointment/ employment by the community, a person voluntarily waives certain rights.<sup>48</sup> According to the principle of voluntarism under the ECHR, individual rights are usually protected by the right to leave the community (the right to exit). There is gradually increasing case law in the ECtHR concerning conflicts between individual rights and collective religious autonomy. It could be argued that there is evidence of a new contextual approach in Strasbourg, which does not so much rely on the principle of voluntarism in religious communities' employment cases, but requires actual balancing in given circumstances. However, the way this new approach is applied in different circumstances and how it affects diversity and the internal life of religious communities (right to collective freedom of religion or belief) or right of faith schools to select (hire and fire) their staff is not clear.

As to domestic law and policy regarding the autonomy of schools to select their staff, similarly to admission requirements, private non-publicly funded schools seem to enjoy most extensive autonomy. However, the general trend in all countries seems to lean towards some kind of general standard in order to guarantee the quality and right to education. Often that means that teachers need to have pedagogical preparation and a relevant (university) degree. In most countries private schools may select their teachers on whatever basis their sponsors think appropriate, but must employ teachers who meet more or less the same qualifications as those in the public schools. In the Netherlands, non- government schools must employ teachers who meet the standards for public schools, and they must provide instruction that is equivalent to, though not necessarily identical with, that provided in public schools.<sup>49</sup>

Faith schools may set additional requirements relevant for their school's mission. The right to discriminate on the grounds of religion does not extend to other schools. For example, in Sweden public schools cannot take any heed to religious, philosophical or political inclination. Independent schools can give priority to those who share the same values as the provider; however, it is mandatory to recruit teachers who fulfil the formal competence qualifications.<sup>50</sup> In Germany religion may not be used as the basis for deciding which teachers to employ in public schools, except in the case of public confessional schools. The schools are also allowed to require certain standards of conduct from teaching staff. While confessional schools employ primarily adherents of the denomination with which they are identified, they sometimes

employ non-believers who must align their teaching to the educational project of the school.<sup>51</sup>

This requirement is not only applicable to Germany, and often extends to teachers behaviour outside the classroom. French courts have found that the obligation upon teachers to respect the distinctive character of the school could not be interpreted as allowing an attack upon their freedom of conscience. They cannot be required to adhere to the doctrines but they have to refrain from statements or behaviour that might compromise the distinctive character of the school.<sup>52</sup> There are limits to what extent teachers need to comply with the schools ethos in their private life. For example, in the Netherlands a teacher at a conservative Protestant school who had a baby out of wedlock could not be fired for that reason.<sup>53</sup> Neither was this the case with a homosexual teacher at a conservative Protestant school who left his wife, decided to live together with another man and made his circumstances public to the media.<sup>54</sup> Thus, there are limits upon the freedom of schools to require that a teacher uphold the mission of the school. However, there is also a great deal of variation on how different countries have dealt with specific factual circumstances.

### *Decisions about curriculum and teaching of values*

As noted above, international and European law and domestic standards in individual states have provided a framework for guaranteeing children's educational development and basic grounding in citizenship. Usually when faith schools are providing general education (primary, basic or secondary school education) they have to follow certain standards regarding curriculum. However, they do have room for upholding their specific character. For example, private schools in Germany, while they must provide an education equivalent to that in state schools, are not required to do so in a similar way, and are free to choose curriculum materials and teaching methods. The schools with a religious character can decide not to provide the state-proscribed sex education.<sup>55</sup> In England, there is much variation in the nature of the secular and religious education provided at independent schools, and they are not required to follow the national curriculum. There is, nonetheless, a good deal of statutory regulation of such schools under which they are required to be on a register of independent schools and to undergo inspection.<sup>56</sup> The regulations set out standards concerning the quality of the education, the spiritual, moral, social and cultural development of the pupils, the welfare, health and safety of the pupils, the suitability of the proprietors and staff, the premises and accommodation, the provision of information, etc.<sup>57</sup> In Estonia the state has broadly defined the sort of values that should be taught both in public and private schools providing general education. To some degree private schools have to follow the national curriculum, but there is room for cultural and religious pluralism. Private schools are entitled to keep to their ethos and values within the given framework. Faith schools, such as Sunday or Bible schools, not established under the Private Schools Act and not providing

general education, are not subjected to state supervision.<sup>58</sup>

As Ahdar and Leigh point out, conflict may arise when a school's religious ethos leads it to teach in a way radically different from societal standards – “perhaps so much so that its pupils could be socially or educationally disadvantaged - or when its teaching is in variance with the prevalent notions of good citizenship”.<sup>59</sup> Ann Blair and Paul Meredith express their concern regarding England's independent schools pointing out that there are potentially strong conflicting interests that the law needs to recognise, including in particular the interests of children, their right to have their eyes opened to a broad range of influences, and their opportunities to participate in wider society in a positive and constructive way when they reach adulthood. “The legal regulation of independent schools has a very important role to play in ensuring that children educated in such schools are placed in a position where they will be able to participate to the optimum degree in wider society”.<sup>60</sup>

Although there is a great deal of variance, it can be argued that all countries represented in this volume provide some general framework for teaching of values reflecting principles set forth in constitutional or international human rights law. For example, in Switzerland some cantonal constitutions require that the education provided in independent schools not be in conflict with the public interest or with morality. In the Netherlands while non-government schools are free to determine their teaching methods and to choose the textbooks that best support their distinctive character, “they would be considered to offend against public order if they chose books that called for overthrowing the government or encouraged unlawful behavior.”<sup>61</sup> Romanian law prohibits, in all educational institutions, any activities that violate moral norms and can put in danger the pupils and the teachers.<sup>62</sup> Estonian constitution sets forth that “beliefs shall not excuse a violation of law”, which in principle applies to the provision of education well.<sup>63</sup>

In the majority of countries, educational principles have been set to reflect values such as personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect, and justice. This setting of general standards stems from international instruments such as, for example, the International Covenant on Economic and Social Rights, whose Article 13 provides that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”<sup>64</sup> It also emphasizes the importance of education in enabling all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.<sup>65</sup>

European and domestic law and policy has also responded to global economic migration and growing numbers of immigrant communities in Europe. In the Netherlands, starting in 1979, activities were developed in the area of intercultural

education to respond to the growing numbers of children of an immigrant background. “Since 1986, learning about growing up in a multicultural society has been established in education legislation for primary and secondary schools.”<sup>66</sup> In Estonia there is a strong emphasis on learning how to navigate in a multi-religious world, while remaining open minded and critical at the same time. Dialogue and respect seem to be the keywords which characterise both the curriculum of basic schools and gymnasiums.<sup>67</sup> Countries in the European Union are recommended to “ensure that religious instruction in schools respects cultural pluralism.”<sup>68</sup> Central government guidance on religious education in England emphasises “the contribution of religious education towards promotion of community cohesion, commenting that ‘it provides a key context to develop young people’s understanding and appreciation of diversity, to promote shared values and to challenge racism and discrimination.’”<sup>69</sup>

Thus, there are some broad general standards to be taken into account in the educational environment; to what extent they apply or should apply to private/ non-governmental faith schools and how they should be applied or monitored is a matter of debate. Ann Blair and Paul Meredith point out that the requirements for the curriculum of independent schools “do afford a certain degree of prescription as to fundamentals, but nonetheless leave independent school providers with a very broad range of discretion as to the nature and content of the education provided in their school, in recognition of the rights of parents and particular groups within society to preserve aspects of their culture and religious convictions.”<sup>70</sup>

In addition to the general framework presented above, international and European law allows taking into account cultural heritage and religious traditions of different European countries to some extent. These traditions have a role to play regarding values taught within the curriculum. This applies to public schools, but may arguably apply to all private schools as well. For example, in Poland the preamble to the post-communist statute on the educational system (1991) provided that Christian values must be respected. “As it is a preamble to the entire statute, one may conclude that all schools, public and non-public (and among them Christian and non-Christian denominational schools) shall respect these values.”<sup>71</sup>

In European public schools, religious education should be provided in an objective, critical and pluralistic manner. This requirement is set forth in the practice of the ECHR.<sup>72</sup> There should be no indoctrination. The state is forbidden to pursue an aim of indoctrination that might be considered as not responding to parent’s religious and philosophical convictions. It is also established in international law that instruction in a particular religion must provide for non-discriminatory exemptions or alternatives which accommodate parental wishes.<sup>73</sup> According to the International Covenant on Civil and Political Rights, states must respect the freedom of parents to ensure the religious and moral education of their children in conformity with their own convictions (Article 18.4).<sup>74</sup> Article 13 (3) of the ICESCR fortifies parents right to



choose for their children schools, other than those established by the public authorities, which conform to minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. Parents are free to set up religious schools.

Doe points out that each state in Europe adopts one or other of the five basic approaches to religious education in public schools. In the first category there is compulsory Christian knowledge which the state designs, teaches and funds but from which there is the possibility of opting out. This category is prevalent in the state-church systems of northern Europe.<sup>75</sup> In Finland, religious education is delivered in the religion of the majority (Christian, Lutheran).<sup>76</sup> Although religious education is Christian it has been considered to be “weak confessional” meaning that the content is based on religious tradition, but does not include the elements of practice. It is non-confessional in a spiritual and confessional sense.<sup>77</sup> The aim is to allow development of students’ own religious views by teaching them about their religion and give them readiness to understand different world views. Religious education in other denominations may be organized and funded by the state, which also provides for alternatives to religious education. In Denmark there is compulsory religious education in Christianity. However, the teaching of Christianity was explicitly made non-confessional in the 1970s. It also introduces other religions and has to give students the foundation for personal decision making and responsibility in a democratic society.<sup>78</sup>

The second category of religious education in public schools is compulsory denominational education, usually designed in partnership with relevant denominations, funded by the state, delivered by public teachers or by the denominations, with exemption from attendance provided for students.<sup>79</sup> This model can be seen in both state-church and cooperation systems of state-religion relationships. For example, in Malta religious education is Catholic, in Greece and Cyprus Orthodox. In contrast, in Austria, Germany and Belgium the duty of the state to provide religious education is not limited to a single denomination.<sup>80</sup> For example, in Austria parents can remove their child from instruction in their religion, which otherwise is compulsory for all children with legally accepted religious denomination.<sup>81</sup>

The third category is optional denominational education. Public schools have to provide for denominational religious education which is designed, funded, and delivered either by the State or by the denomination. This category is represented in Italy, Spain, Portugal, and in some central and eastern European states.<sup>82</sup> For example, in Portugal the Constitutional Court decisions have found that teaching Catholic beliefs in public schools is consistent with the Constitution. The decisive argument adopted by the Constitutional Court was that non-Catholic parents were free to choose another discipline within the school curricula.<sup>83</sup>

In the fourth category is non-denominational religious education, provided in public schools with or without state funding (e.g. Sweden, Estonia, and Bulgaria). The curriculum in Sweden states that teaching in the school should be non-denominational.<sup>84</sup> And the fifth category is where the state prohibits religious education in public school premises, but allows it elsewhere (France and Slovenia).<sup>85</sup>

There are differences in how religious education has been implemented in private schools. Estonian law explicitly allows confessional religious education in private educational institutions.<sup>86</sup> This is a general provision which applies to all private schools, not just confessional ones. However, the law also states that confessional religious education is voluntary.<sup>87</sup> Thus when a private faith school is providing general education it needs to guarantee freedom of conscience and the right of parents to educate their children in conformity with their own convictions. This issue seems to be current in other countries also, where faith schools are admitting pupils with different religious or no religious background or receive public funding. In Estonia, faith schools may also potentially be required to provide non-confessional religious education. In Austria religious instruction has to be provided for all legally recognized churches and religious communities, and at private schools with public status, even if the relevant school has a distinctive religious ethos which runs contrary to this instruction.<sup>88</sup>

## Conclusion

It can be argued that despite differences between countries, the status and future of faith schools create debates throughout Europe. These public and political debates seem to be channelled into broader questions about the aims of education in a multi-religious or cultural society generally and religious education and citizenship building specifically. In legal, human rights terms one also has to note that there are different and potentially conflicting rights in play. Individual rights, such as, rights to education, non-discrimination, right to privacy and freedom of religion or belief, parents' rights to educate their children in conformity with their own beliefs may conflict with the collective religious autonomy of religious communities and, in the present case, autonomy of faith schools. There is increased attention and pressure at least by part of the human rights community to protect human rights and liberal values within religious communities. This in turn presents the challenging question of how far the State needs to go in protecting individual rights. These challenges have found variable responses in the school environment in different countries and what the future holds in this regard is not entirely clear.

The value of pluralism of ideas in a democratic society and the value of religion to many individuals should not be overlooked. The importance of religious communities and their affiliated institutions such as schools to individuals having a

particular faith deserves respect and careful consideration when the balancing exercise is undertaken between different rights.

## Endnotes

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<sup>1</sup> Known technically as ‘margin of appreciation’.

<sup>2</sup> Freedom of religion or belief is protected by a multitude of international instruments, most importantly by Article 18 of the Universal Declaration of Human Rights, Article 9 of the European Convention on Human Rights and Fundamental Freedoms, and Article 18 of the International Covenant on Civil and Political Rights. Universal Declaration of Human Rights (adopted 10 Dec 1948) UNGA Res 217 A III (UDHR); European Convention on Human Rights and Fundamental Freedoms (adopted 4 Nov 1950, entered into force 3 Sept 1953) 213 UNTS 221 (ECHR); International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171 (ICCPR).

<sup>3</sup> *Hasan and Chaush v Bulgaria* (App no 30985/96) 34 EHRR 35 para 62.

<sup>4</sup> For a comprehensive comparative account on the understandings of autonomy of religious organizations and the scope for legitimate intervention by the State see e.g. Norman Doe, *Law and Religion in Europe* (OUP, 2011), 114-138. Doe points out that there are variable points of view what constitute religious matters/internal matters of a religious community. State intervention may also depend on the particular religious activity in question.

<sup>5</sup> Conor O’Mahony, ‘Ireland’.

<sup>6</sup> Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, Oxford 2008), 168.

<sup>7</sup> Ann Blair and Paul Meredith, ‘England’.

<sup>8</sup> Charles L. Glenn, ‘Germany’; Hans Michael Heining, ‘Religion in Public Education – Germany’ in Gerhard Robbers (ed.), *Religious Education in Public Schools* (ECCSR, Trier 2011), 171.

<sup>9</sup> Charles L. Glenn, ‘Germany’.

<sup>10</sup> Sophie van Bijsterveldt, ‘Religion in Public Education in the Netherlands’ in Gerhard Robbers (ed.), *Religious Education in Public Schools* (European Consortium for Church and State Research, Trier 2011), 366.

<sup>11</sup> Rik Torfs, ‘Religion in Public Education in Belgium’ in Gerhard Robbers (ed.), *Religious Education in Public Schools* (ECCSR, Trier 2011), 63; José Luis Martínez Lopez-Muniz, Jan De Groof, Gracienne Lauwers, *Religious Education in Public Schools: Study of Comparative Law*, Springer, Dordrecht, 2006, 29; Jim Deridder, ‘Belgium

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(Flemish Community)’.

<sup>12</sup> See e.g. Art. 13 (4) of the UN Covenant on Economic, Social and Cultural Rights 1966; Art. 5(1)(b) of the Convention Against Discrimination in Education 1960; Art. 29(2) of the UN Convention on the Rights of Child 1989.

<sup>13</sup> Conor O’Mahony, ‘Ireland’.

<sup>14</sup> Sophie van Bijsterveldt, 367.

<sup>15</sup> Myriam Hunter-Henin (ed.), *Law, Religious Freedoms and Education in Europe* (Cultural Diversity and Law) (Ashgate, 2012), 10.

<sup>16</sup> Charles L. Glenn, ‘Germany’

<sup>17</sup> Paul J.J. Zoontjens and Charles L. Glenn, ‘Netherlands’.

<sup>18</sup> André Legrand and Charles L. Glenn, ‘France’.

<sup>19</sup> David McClean, ‘Religion in Public Education – United Kingdom’ in Gerhard Robbers (ed), *Religious Education in Public Schools* (ECCSR, Trier 2011), 515.

<sup>20</sup> Rik Torfs, 63.

<sup>21</sup> Sophie van Bijsterveldt, 377.

<sup>22</sup> Paul J.J. Zoontjens and Charles L. Glenn, ‘Netherlands’.

<sup>23</sup> Rik Torfs, 63.

<sup>24</sup> Fulvio Cortese, Cinzia Piciocchi, and Charles Glenn, ‘Italy’.

<sup>25</sup> Paul J.J. Zoontjens and Charles L. Glenn, ‘Netherlands’.

<sup>26</sup> Walter Berka and Charles L. Glenn, ‘Austria’.

<sup>27</sup> Ibid.

<sup>28</sup> Paul J.J. Zoontjens and Charles L. Glenn, ‘Netherlands’.

<sup>29</sup> Rex Ahdar, Ian Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005), 257-258.

<sup>30</sup> Hans Michael Heinig, ‘Religion in Public Education – Germany’ in Gerhard Robbers



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(ed.) *Religion in Public Education* (Trier, 2011), 172.

<sup>31</sup> Charles L. Glenn, 'Switzerland'.

<sup>32</sup> André Legrand and Charles L. Glenn, 'France'.

<sup>33</sup> Walter Berka and Charles Glenn, 'Austria'.

<sup>34</sup> Merilin Kiviorg, 'Estonia'.

<sup>35</sup> Netherlands, Supreme Court 22 Jan 1988, Dutch Case Law 1988. 891. Protocol No 1, Article 2 of the ECHR 'gives parents a fundamental right *vis-à-vis* the State to respect of their choice of education of a specific character, but does not give a right that can be enforced *vis-à-vis* a private organisation that provides such education.'

<sup>36</sup> *R. (E) v. Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15.

<sup>37</sup> Sandra Fredman, *Discrimination Law* (2<sup>nd</sup> edn OUP, Oxford 2011), 207.

<sup>38</sup> Jim Deridder, 'Belgium (Flemish Community)'.

<sup>39</sup> *R. (E) v. Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15. J.H.H Weiler, 'Discrimination and Identity in London: The Jewish Free School Case', 1 *Jewish Review of Books* (Spring 2010).

<sup>40</sup> André Legrand and Charles L. Glenn, 'France'.

<sup>41</sup> For example, the ECtHR has recognized religion or beliefs as salient aspects of identity. The court has also emphasised the contribution of religious freedom to the promotion of democratic pluralism. 'The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.' *Kokkinakis v. Greece* (App no 14307/88) (1993) 17 EHRR 397, para 31.

<sup>42</sup> Charles L. Glenn, 'Germany'.

<sup>43</sup> Walter Berka and Charles Glenn, 'Austria'.

<sup>44</sup> Council Directive (EC) 2000/78 on Employment Equality [2000] OJ L195/16. For an overview of EU law relevant in the field of religion see Norman Doe, 'Towards a 'Common Law' on Religion in the European Union' (2009) 37 (1) *Religion, State & Society* 147-166. See also N Doe, *Law and Religion in Europe: A Comparative Introduction* (OUP, Oxford 2011).

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<sup>45</sup> Art. 4, Employment Directive 2000/78.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> *X v. Denmark* (App no 7374/76) (1976) 5 DR 157. See also *E/GR v. Austria* concerning the levying contributions from church members, *E/GR v. Austria* (App no 9781/82) (1984) 37 DR 42; *Williamson v. UK* concerning Church of England priest opposing the decision of the Church to ordain women, *Williamson v. UK* (App no 00027008/95) 17 May 1995; *Karlsson v Sweden* (App no 12356/86) (1988) 57 DR 172; *Rommelfanger v. the Federal Republic of Germany* (App no 12242/86) (1989) 62 DR 151.

<sup>49</sup> Paul J.J. Zoontjens and Charles L. Glenn, ‘Netherlands’.

<sup>50</sup> Inger Enkvist, Frank Nordberg, and Elisabeth Porath Sjöo, ‘Sweden’.

<sup>51</sup> Charles L. Glenn, ‘Germany’; Avenarius and Heckel, 106, 304-5.

<sup>52</sup> André Legrand and Charles L. Glenn, ‘France’.

<sup>53</sup> Paul J.J. Zoontjens and Charles L. Glenn, ‘Netherlands’.

<sup>54</sup> Rechtbank Den Haag (District Court the Hague) 2 november 2011, LJN: BU3104.

<sup>55</sup> Charles L. Glenn, ‘Germany’.

<sup>56</sup> Ann Blair and Paul Meredith, ‘England’.

<sup>57</sup> Ibid.

<sup>58</sup> Merilin Kiviorg, ‘Estonia’.

<sup>59</sup> Rex Ahdar, Ian Leigh, 256.

<sup>60</sup> Ann Blair and Paul Meredith, ‘England’.

<sup>61</sup> Paul J.J. Zoontjens and Charles L. Glenn, ‘Netherlands’.

<sup>62</sup> Raluca Bîgu, ‘Rumania’.

<sup>63</sup> Article 41 (2), RT I 1992, 26, 349.

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<sup>64</sup> ICESCR (adopted 16 Dec 1966, entered into force 3 Jan 1976) 993 UNTS 3.

<sup>65</sup> Ibid.

<sup>66</sup> Paul J.J. Zoontjens and Charles L. Glenn, 'Netherlands'.

<sup>67</sup> Merilin Kiviorg, 'Estonia'.

<sup>68</sup> Rec. 1396 (1999) 27 January 1999; Rec. 1720 (2005) 4 December 2005.

<sup>69</sup> Ann Blair and Paul Meredith, 'England'.

<sup>70</sup> Ibid.

<sup>71</sup> Katarzyna Górak-Sosnowska, Stanisław Łopatowski, Urszula Markowska-Manista, and Michał Rynkowski, 'Poland'.

<sup>72</sup> *Kjeldsen, Busk Madsen and Petersen v. Denmark* (App nos 5095/71, 5920/72, 5926/72) (1979) 1 EHRR 71; *Folgerø v. Norway* (App no 15472/02) ECHR 29 Jun 2007.

<sup>73</sup> General Comment No 22 (ICCPR, Art. 18) UN GAOR Hum. Rts. Comm. (1993).

<sup>74</sup> ICCPR (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171.

<sup>75</sup> Norman Doe, 'Religion and Public Schools in the States of the European Union – a Juridical Overview' in Gerhard Robbers (ed.), *Religion in Public Education* (Trier, 2011), 31.

<sup>76</sup> Matti Kotiranta, 'Religious Education in Finland' in Gerhard Robbers (ed.), *Religion in Public Education* (Trier, 2011), 145.

<sup>77</sup> Ibid, 145-147.

<sup>78</sup> Lisbet Christoffersen, 'Religion in Public Education – Denmark' Gerhard Robbers (ed.), *Religion in Public Education* (Trier, 2011), 114-115.

<sup>79</sup> Norman Doe, 'Religion and Public Schools in the States of the European Union – a Juridical Overview' in Gerhard Robbers (ed.), *Religion in Public Education* (Trier, 2011), 32.

<sup>80</sup> Ibid., 33.

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<sup>81</sup> Walter Berka and Charles Glenn, ‘Austria’.

<sup>82</sup> Norman Doe, 34.

<sup>83</sup> Rodrigo Queiroz e Melo, ‘Portugal’.

<sup>84</sup> Inger Enkvist, Frank Nordberg, and Elisabeth Porath Sjöö, ‘Sweden’.

<sup>85</sup> Norman Doe, 36.

<sup>86</sup> Merilin Kiviorg, ‘Estonia’. This provision was included by the new Basic Schools and Gymnasiums Act which amended several paragraphs of the Private Schools Act (See Art 105 of the BSG).

<sup>87</sup> Ibid., ‘Estonia’.

<sup>88</sup> Stefan Hammer and Johannes Franck, ‘Religion in Public Education – Report on Austria’ in Gerhard Robbers (ed.), *Religion in Public Education* (Trier, 2011), 47.